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No. 06-341

SUPREME COURT U.S.
FILED
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In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

In their opening briefs, BCI and its *amici* established that, in this case, the Tenth Circuit read too broadly the scope of employers' liability under Title VII for discriminatory acts of a supervisory employee who was *not* the decisionmaker for the challenged employment action. Respondent's brief does not salvage or justify that flawed ruling. If anything, Respondent implicitly identifies additional errors in the decision below, particularly the Tenth Circuit's failure to analyze whether the supervisor's conduct was a "proximate cause" of the employment action.

The arguments Respondent advances lack merit. Respondent focuses its attention on the supervisor as an "agent" for certain purposes. But Title VII does *not* hold employers liable for *all* biased acts of their agents; rather, the statute applies only to certain specified kinds of employment actions, such as termination from employment. Applied correctly, the statute does not impose liability on BCI for the conduct of its supervisor in this case: reporting an employee's insubordination, allegedly with a racial motivation. The covered employment action in this case was instead undertaken by a *different* "agent," who is not alleged to have harbored any bias. Separately, although Respondent correctly recognizes the importance of the proximate causation inquiry that the Tenth Circuit failed to require, it misapplies that requirement. Causation does not exist when the actual decisionmaker has made an independent decision without knowing or having reason to know of discriminatory bias by lower-level employees. As regards this case, the undisputed facts reveal that BCI's actual decisionmaker, Edgar, independently decided to terminate Peters solely because of his insubordinate misconduct and without even knowing his race. Although in light of these facts BCI should

win even under Respondent's standard, BCI's suggested standard better matches the intended scope of Title VII liability without imposing on employers the burden of impractical investigations which Respondent's standard necessarily entails.

I. RESPONDENT'S DELEGATED AUTHORITY STANDARD DOES NOT FOCUS ON THE RELEVANT AGENT UNDER TITLE VII AND PRESENTS A LESS PRACTICAL APPROACH TO CAPTURING DISCRIMINATION IN THE WORKPLACE.

1. Respondent's strategy in this case is to place this Court's focus on Grado as Peters's supervisor, characterizing Grado as an "agent" acting within the "scope of his authority." Under Respondent's view, BCI is liable for Grado's conduct if that conduct was a factual and legal cause of Peters's termination. Yet, that is not how the statute operates. Title VII does *not*, as Respondent assumes, render employers liable for all acts of their agents. Rather, it applies only to agents' actions that constitute adverse employment actions as particularly specified in the statute. To be actionable, the allegedly discriminatory conduct must involve certain tangible or adverse employment actions such as hiring and discharging, or actions with respect to "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); *see also Burlington N. & Santa Fe Ry. v. White*, 126 S.Ct. 2405, 2411-12 (2006).

Nothing that Grado did—even assuming he was motivated by bias and was acting within the scope of his delegated authority—rises to the level of an adverse employment action under Title VII. *See* 42 U.S.C. § 2000e-2(a)(1); *White*, 126 S.Ct. at 2411-12. Rather, the only potentially actionable

adverse employment action at issue is Peters's termination, a decision undeniably delegated to, and made by, Edgar. JA 18, 31, 86–87, 91–92. Thus, though Grado may have been BCI's agent for certain purposes, he was not BCI's agent for the purpose of making termination decisions, nor did he exert a sufficient level of influence to become BCI's agent (the *de facto* decisionmaker) with respect to Peters's termination. Pet. Br. 24–25.

Respondent relies on the truism that "'principals or employers'" are "'vicariously liable for acts of their agents or employees in the scope of their authority or employment.'" Resp. Br. 17 (citation omitted). It may be, as Respondent asserts, Resp. Br. 36–37, that Grado was acting within the scope of his employment and thus as an "agent" of BCI. But as discussed above, that is not the relevant question. Title VII by its terms simply does not render an employer liable for *all* tortious conduct of its agents. The cases cited by Respondent involve situations in which "[t]angible employment actions fall within the special province *of the supervisor*." *Burlington Indus., Inc. v Ellerth*, 524 U.S. 742, 762 (1998) (emphasis added). The Court held in that circumstance that "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Id.*

Respondent asserts to the contrary that the holding of *Ellerth* "logically applies *whenever* a supervisor's 'discriminatory act' of a type that a supervisor is empowered to perform because of his supervisory capacity '*results in* a tangible employment act.'" Resp. Br. 21 (quoting *Ellerth*, 524 U.S. at 760) (first emphasis added). But Respondent notably gives no explanation for this supposedly "logical" extension of Title VII, which does not reflect the statute that Congress actually took the care to frame and enact. Nor does the dictum from *Ellerth* quoted by Respondent stand for the

broad proposition for which it is invoked; the preceding sentence explains that the Court's holding addresses circumstances "when a supervisor *takes* a tangible employment action against the subordinate." *Ellerth*, 524 U.S. at 760 (emphasis added). In fact, this Court in *Ellerth* adopted a distinct rule—which, critically, Respondent ignores—for situations in which the supervisor does not take an adverse employment action. 524 U.S. at 765.

2. Not only does BCI's standard focus properly on the relevant agent under Title VII, but it also provides a superior framework for analyzing claims based on allegations of subordinate bias because it more effectively captures actionable workplace discrimination without imposing impractical and unduly burdensome standards on employers. For example, Respondent's position that employers are not liable for the racially motivated report of an "ordinary employee" loses footing by a comparison to BCI's EEO policy. JA 26–27. This policy provides that "all employees are likewise obligated . . . to report incidents of harassment or discrimination to responsible managers without delay." *Id.* Suppose that one of Peters's co-workers were to report—falsely and for racially motivated purposes—to BCI's HR Manager that Peters had sexually harassed her. Under the EEO policy, the reporting employee would be exercising delegated authority. Suppose further that this female employee had been previously reported and disciplined for making racial slurs against African-American coworkers. If the HR Manager thereafter terminated Peters for this alleged conduct, Respondent's proposed standard would preclude liability—even though the reporting employee was acting within the scope of her delegated authority and even though the HR Manager at least should have known of her bias. By contrast, BCI's standard could hold employers liable based on negligence and causation. *See* Pet. Br. 28–32.

Similarly, suppose a high-ranking manager working in a finance position in BCI's regional offices in Phoenix (with no supervisory authority over employees in Albuquerque) were known to be intolerant of female workers and to frequently state his wish to rid the BCI workforce of female employees. Suppose this manager falsely reported to Edgar that he heard that one of BCI's female merchandisers was incompetent. Suppose the manager demanded that Edgar fire the female merchandiser, and Edgar felt so intimidated by the manager's level of influence that she accepted his report at face value and fired the female merchandiser on the spot, notwithstanding that she herself harbored no gender bias against the female merchandiser. Under such a scenario, BCI would not be liable under Respondent's standard, which excludes liability based on the reports of coworkers as well as on the reports of supervisory level employees acting outside of the scope of their delegated authority. Resp. Br. 23. By contrast, BCI's standard would preclude summary judgment for BCI in this hypothetical scenario based on the fact that the biased manager was the *de facto* decisionmaker.

3. Respondent applies a mistakenly cramped view of the scope of the respondeat superior theory of vicarious liability relied upon by BCI. Respondent states that BCI's "actual decisionmaker" standard would not capture discrimination where a biased, low-level supervisor with no disciplinary authority recommended discharge for racially motivated reasons. Resp. Br. 26. BCI's standard, in fact, could capture the discrimination in such a scenario via either of two avenues. First, if the biased recommendation were rubber-stamped by the formal decisionmaker without an independent evaluation, then liability would attach. *See* Pet. Br. 21–24. Second, were the bias of the low-level supervisor reported or otherwise known or knowable to BCI's decisionmaker, then BCI would be liable if it failed to respond appropriately to the

bias or otherwise allowed the biased recommendation to be a substantial factor in the discharge decision. Pet. Br. 28–32. Thus, contrary to Respondent's claim, BCI's standard would preclude summary judgment where an employee who is not the actual decisionmaker had generated a false report (or selectively generated an accurate report) which was a motivating factor for an employment decision, so long as the employee could present evidence that the employer knew or should have known that the employee bringing the report was biased. By contrast, Respondent's standard would preclude liability under such a scenario unless the employee bringing the false or selective report had been a supervisor acting within the scope of his delegated authority.

4. Respondent's disparagement of BCI's second avenue of employer liability—negligence and causation—fails to properly acknowledge its scope, its fulfillment of the objectives of Title VII, and its grounding in employer liability for coworker sexual harassment.

a. Respondent asserts that expanding the scope of liability "creates an incentive for employers to intensify their efforts to prevent their agents from causing harm." Resp. Br. 21. That manifestly is not correct, as this case demonstrates. All agree that BCI did everything possible to root out discrimination in the workplace. Among other things, BCI had adopted effective, mandatory antidiscrimination policies and reporting procedures, and, despite the company's best efforts, it had no reason to suspect that Peters's termination was infected by racial bias. A rule holding companies such as BCI liable in these circumstances would actually diminish the incentive to create and enforce such policies. Employers would have less incentive to incur the expense of creating and maintaining these policies and processes if liability would be imposed regardless.

Moreover, Congress did not determine to impose employer liability at all costs; rather, it designed a balanced scheme that also accounts for the realities of the American workplace, which is sometimes difficult to police by even the most attentive employer. Congress could have adopted a statute that would have created a damages-driven incentive for employers to make Herculean efforts to investigate each and every employment decision for racial bias. But that approach would have imposed extraordinary inefficiencies and costs and would have distracted employers from investigating those cases in which there were actually apparent reasons to suspect discrimination.

Tellingly, Respondent identifies no additional measures that BCI could have implemented to discover Grado's alleged bias. It is undisputed that BCI maintained a strong anti-discrimination policy and a procedure for employees to report discriminatory conduct. *See* JA 26–27. It is undisputed that Peters had received and was aware of these policies and procedures. *See* JA 305–06. It is further undisputed that BCI surpassed mere compliance with Title VII's design of encouraging the adoption of such policies by also providing training in diversity and in Title VII issues for its managers (including non-decisionmaking managers) and by implementing a centralized decisionmaking process, thereby fostering consistency in the making of disciplinary decisions by well-trained personnel. JA 18, 24–25, 45.

As to the case at bar, no one utilized these processes to alert BCI about Grado's alleged behavior so that BCI could address it. *See* JA 49, 323–24. Peters (now) claims that he and other African-American employees had been subjected to disparate treatment by Grado for years. JA 106, 193–201. Yet, he never reported Grado. JA 323–24. Instead, he waited until he had been terminated, after a run-in with

Grado, in which he himself undeniably acted inappropriately, then went directly to the EEOC with his belated complaints of bias. He never afforded BCI the opportunity to address Grado's alleged bias, not even when given an opportunity to respond in the meeting when he was terminated. JA 221–22; *see infra*, p. 19.

Respondent thus seeks to hold BCI liable for the unknown and unknowable discrimination of Grado and thereby to vaguely encourage BCI and others to "intensify their efforts." In other words, Respondent seeks to hold BCI liable despite its obvious best efforts in this regard and does so without suggesting what additional policies BCI should or could have implemented to discover this conduct. In this situation, Congress simply could not have intended for Grado to be considered an agent so as to subject his employer to liability.

b. Respondent's criticism of BCI's negligence standard as "minimal" fails to appreciate its scope. BCI's negligence standard finds roots in Title VII jurisprudence on employer liability for coworker (as opposed to supervisory) harassment. Respondent concedes that "the question presented here concerns the employer's vicarious liability for the conduct of one employee toward a fellow employee." Resp. Br. 26. This conclusion is correct because it is undisputed that Grado, although a supervisor for some purposes, had no authority to impose discipline on Peters. In the arena of adverse employment actions, therefore, the relationship between Grado and Peters is better characterized as coworker instead of supervisor-subordinate. *Cf., e.g., Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1034 (CA7 1998); *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 179 (CA4 1998). Under such circumstances, tying an employer's liability to its negligence in discovering bias is best analogized to the negligence standard for employer liability in coworker

harassment cases as adopted by the courts of appeals and the EEOC. *See, e.g., Hall v. Bodine Elec. Co.*, 276 F.3d 345, 356 (CA7 2002); 29 C.F.R. § 1604.11(d). Applying that standard, BCI should not be held liable because it had appropriate anti-discrimination policies and reporting mechanisms in place, and Respondent has produced no evidence that BCI was negligent in failing to discover Grado's alleged bias.[1]

II. RESPONDENT'S ANALYSIS OF THE TWO-PART CAUSATION INQUIRY BOLSTERS BCI'S ARGUMENT THAT THE TENTH CIRCUIT ERRED IN ITS CAUSATION ANALYSIS.

1. In stark contrast to the Tenth Circuit's opinion, Respondent is correct to recognize that an employer's liability under Title VII requires a plaintiff to satisfy a two-part causation inquiry: (1) that the alleged bias was a cause in fact of the adverse employment action; and (2) that the bias proximately caused the adverse action. Resp. Br. 30–31. This analysis recognizes implicitly that the Tenth Circuit's causation analysis did not include a proximate, or legal,

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[1] Respondent states that "it did not conduct a full-scale investigation into petitioner's claims about the quality of its training and monitoring program." Resp. Br. 29 n.3. This is inaccurate. Respondent specifically sought an injunction against BCI regarding its policies and procedures, JA 7 ¶ B, and this matter was the subject of BCI's motion for summary judgment. *See* JA 15–16; *compare* BCI's Memorandum of Law in Support of Motion for Summary Judgment, Trial Record at No. 66, p. 25, *with* EEOC Reply Memorandum, Trial Record at No. 73, pp. 25–29. The District Court pretermitted this issue, Pet. App. 75a n.12, but Respondent did not appeal this aspect of the case, *see* Pet. App. 14a.

causation inquiry but rather only a cause-in-fact, or but-for, analysis. *See* Pet. App. 26a–30a.

Under the appropriate proximate causation inquiry, alleged bias would be considered a proximate cause of an adverse employment action where it is a "substantial factor" in the ultimate action and there is no policy or rule of law that would nonetheless preclude a finding of liability. *See* RESTATEMENT (SECOND) OF TORTS § 431 (1965). In other words, once cause-in-fact has been found, "there remains the question whether the defendant should be legally responsible for the injury." W. PAGE KEETON, ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42, p. 273 (5th ed. 1984); *see also Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (using "'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts"); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 713 (1995) (O'Connor, J., concurring) ("Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences."). The inquiry whether a supervisor's conduct constitutes a sufficient "substantial factor" considers all the "factors which contribute in producing the harm and the extent of the effect which they have in producing it" and "whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible." RESTATEMENT (SECOND) OF TORTS § 433(a)–(b). Respondent seemingly recognizes that the bottom-line question is whether a prohibited characteristic "'played a role in th[e] process and had a *determinative influence* on the outcome." Resp. Br. 31 (quoting *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993)).

2. Respondent's argument that a post-incident investigation is necessary to break the causal chain is not supported by the text of Title VII, and it betokens no practical application in today's workplace. Although Respondent acknowledges that Title VII does not require employers to conduct workplace investigations, it effectively seeks to impose, like the Tenth Circuit, a *de facto* requirement that the appointed decisionmaker conduct a comprehensive workplace investigation, including interviewing the affected employee[2]

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[2] Of course, if questioned by Edgar, Peters, if truthful, could only have admitted that: (1) BCI was experiencing a merchandiser shortage and that he was the only merchandiser available for Sunday coverage; (2) he had worked fewer scheduled days off the preceding year than his white and Hispanic coworkers; (3) he refused both Katt's and Grado's requests to come to work Sunday based, at least in part, on his "plans"; (4) he persisted in this refusal even after being ordered to work by Grado and after being told that his conduct would be considered insubordination; (5) he told Grado to "do what you have to do"; (6) *after* unequivocally refusing to come in on Sunday, he visited a clinic and called in sick to Katt; (7) he felt well enough to work Friday and Monday, but not Sunday, the day he *already* had refused to work; (8) he made no attempt to contact Grado over the weekend, despite having been openly defiant to him on Friday and having been told his job was in jeopardy; and (9) he had previously been disciplined for insubordination by a different supervisor. *See* Pet. Br. 3–12. In other words, whatever Peters might have said in protest, Edgar could have learned nothing that would have affected her decisionmaking process. Indeed, even had she learned Grado was an alleged racist, given all of the *undisputed* facts regarding Peters's conduct, Edgar's thought processes, and BCI's policies, the termination would have (and should have) occurred regardless. *Id*; JA 45–46, 51. Thus, Edgar's failure to speak directly to Peters is, in *this* case, immaterial.

and other relevant witnesses, before taking any adverse employment action. Resp. Br. 14, 33–35.

Yet, the impractical and unduly burdensome nature of an investigation requirement is illuminated when the requirement is viewed as a universal rule governing the myriad of adverse employment actions in the workplace. For instance, suppose a panel of ten supervisory-level employees were to interview twenty job applicants. After interviewing, all ten supervisors provide recommendations to a human resources representative who has been delegated sole decisionmaking authority for filling the position. Suppose the supervisors overwhelmingly endorse the twentieth candidate; as a result, the other nineteen candidates could potentially have been subjected to an adverse employment action under Title VII (i.e., not being hired).

Under Respondent's standard, in order to avoid potential liability for a failure-to-hire claim, *before making a final hiring decision* the human resources representative would be required to presume as a matter of course that the interview process had been potentially tainted by discriminatory bias and would have to conduct an investigation to ferret it out, should it exist. In other words, the human resources representative would have to investigate to confirm the absence of any discriminatory bias before proceeding to make the hiring decision. According to Respondent's theory, this investigation would include, at minimum, directly contacting all nineteen unsuccessful job applicants in order to obtain their side of the story and investigating the possibility of unreported bias on the part of the interviewers. Applying Respondent's mandatory assumption of discriminatory bias and its attendant investigation requirement to all workplace decisions where input from supervisors acting within the scope of their delegated authority, potentially could have resulted in adverse employment actions—*e.g.*, denial of pay raises, bonus

payments, and promotions, demotions, transfers, and all other disciplinary actions short of termination—would impose extraordinary burdens on employers. This proposed standard is unrealistic and untenable.

3. Rather than impose an impractical rule requiring a post-action investigation, the more prudent approach is to hold that a plaintiff meets her burden of proving proximate causation (after having proven cause in fact) when she shows, at a minimum, that the decisionmaker failed to make an independent decision. Congressional policies behind Title VII dictate that an employer should not be legally responsible under Title VII if its relevant agent, the decisionmaker, makes an independent decision and had no reason to know that bias was somehow involved at a lower level.

Respondent's reliance upon the *Shager* and *Long* decisions as support for an investigation requirement, *see* Resp. Br. 33, is misplaced. These decisions contemplate an independent *decision*—not an independent, full-blown *investigation*—as breaking the causal chain. *See Shager v. Upjohn Co.*, 913 F.3d 398, 406 (CA7 1990) (stating that "there would be no ground for finding even an innocent violation of the Act" had the decisionmaker "made an independent decision to fire Shager"); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (CA5 1996) (although using the term "independent investigation," relying upon *Shager*'s independent-decision analysis); *see also* Pet. Br. 29 and cases cited therein. Stated differently, under the appropriate proximate-causation inquiry the causal chain would be deemed broken when the decisionmaker has made an independent decision without knowing or having reason to know that a subordinate in the chain had harbored discriminatory animus. In that situation, considerations of fairness dictate that liability should not be imposed.

III. GRADO'S ALLEGED RACIAL MOTIVATION WAS NEITHER THE CAUSE IN FACT NOR THE PROXIMATE CAUSE OF PETERS'S TERMINATION; THUS, BCI PREVAILS EVEN UNDER RESPONDENT'S STANDARD.

Respondent presented very weak evidence of bias in this case.[3] Assuming Grado harbored such bias, however, even under Respondent's proposed standard summary judgment should have been granted because: (1) there is no proof permitting the reasonable conclusion that Grado engaged in a discriminatorily motivated use of delegated authority which was a substantial factor in bringing about a tangible employment action; and (2) policy considerations exist that nonetheless break any causal chain and preclude BCI's liability.

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[3] The after-the-fact declaration testimony of Peters and other BCI employees consists primarily of vague and conclusory allegations that Grado treated African American employees "worse" than other employees and told inappropriate racial jokes. JA 106, 193-201. None of this conduct is alleged to have been directed toward Peters, who was never written up by Grado prior to the incident leading to his termination, JA 104, except for the extremely equivocal testimony of Katt that Grado "might" have used the "n" word towards Peters after he was terminated, when Grado learned that Peters was suing BCI. JA 277. Further, the Tenth Circuit and Respondent highlight that "fewer than 2%" of BCI's Albuquerque employees were African American without explaining its relevance or comparing that percentage to Albuquerque's demographics. Pet. App. 2a; Resp. Br. 2. Indeed, the District Court found that this fact was not "sufficient to create a genuine issue of material fact on the issue of pretext, and the EEOC does not explain how it does." Pet. App. 71a–72a n.10.

1. Under a cause-in-fact analysis, Respondent must submit evidence that Grado's bias was the but-for cause in his decision to involve Edgar—the only delegated authority he had in the disciplinary arena. *See, e.g., Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (CA10 1994); *Hong v. Children's Mem'l Hosp.*, 993 F.2d 1257, 1265-66 (CA7 1993). As the District Court found, Respondent failed to present sufficient evidence connecting Grado's alleged racial bias to his decision to involve Edgar, which he did *before* Peters was insubordinate. Pet. App. 67a-68a. Although both the Tenth Circuit and Respondent appear to assume that this causal nexus exists in this case, the record shows otherwise. For instance, Respondent conclusorily asserts that there is evidence from which a jury could conclude that Grado would not have reported Peters to Edgar were he not African American. Resp. Br. 38-39. As the District Court recognized, however, the Hispanic employees who supposedly received more favorable treatment than Peters—Monica Lovato and Arturo Lopez—were not similarly situated to Peters as a matter of law and were therefore not proper comparators to Peters for purposes of determining whether Grado's supposed racial bias resulted in racially selective reporting of offenses.[4] *See* Pet. App. 67a; *see also*

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[4] Respondent assumes as a fact the Tenth Circuit's statement that affiant Bryan Esquibel "gave a number of examples of Hispanics who had engaged in insubordination, but who were not fired." Resp. Br. 7 (citing Pet. App. 25a, which cited to Esquibel Aff., JA 197 ¶ 8). The Tenth Circuit's statement, however, did not say that these employees were insubordinate, but only that they did not obey directives. Pet. App. 25a. There is a dispositive and undisputed distinction between an employee's failure to carry out directives and insubordinate conduct. *See* JA 20. Moreover, the assumption that these employees were Hispanic, Pet. App. 25a; Resp. Br. 7-8, is not supported by the record. *See* JA 197, ¶ 8.

Edwards v. Grand Casinos of Miss., Inc., No. 05-60030, 145 Fed. Appx. 946, 948 (CA5 Aug. 18, 2005); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (CA6 1992).

For instance, the following distinguishing facts are undisputed with respect to Lovato: (1) unlike Peters, Lovato never dealt directly with Grado, who only found out about Lovato's conduct the week after it occurred, JA 274–75; (2) unlike Peters, Lovato, although initially expressing reluctance to come to work on her birthday weekend, ultimately *agreed* to do so; she did not state that she was refusing to come in and did not tell Grado (or Katt for that matter) that he should just do what he had to do, after being warned that she was being insubordinate and could be terminated, *Id.*; Pet. App. 67a; (3) Lovato failed to show up for work, committing an attendance violation; her conduct, unlike Peters's conduct, did not meet the definition of insubordination under BCI's policies. JA 36–37, 48, 274–76; Pet. App. 67a. As the District Court recognized, a "no show" violation cannot be compared to the blatant defiance displayed by Peters. Pet. App. 67a.

With respect to Lopez, the following facts are undisputed: (1) he failed to return both Katt's and Grado's pages, at which time Grado instructed him (via text message) that failure to return the page could lead to his termination, JA 36; (2) unlike Peters, however, Lopez did not respond by openly defying Grado and telling him to "do what you have to do"; (3) Lopez, in fact, never responded at all, because he had already quit his employment with BCI, JA 36, 48, 188–92; (4) once Grado realized Lopez had walked off the job without notice, he reported that fact to Pedersen, and Lopez was deemed to have abandoned his job and was designated as

ineligible for rehire. JA 35, 48, 295. This situation bears no resemblance to Peters's conduct toward Grado.[5]

In addition, both the Tenth Circuit and Respondent approach this case under the impression that Grado observed Peters's misconduct and reported it to Edgar who then performed a post-incident evaluation. This is an incorrect characterization of what actually occurred. Grado actually contacted Edgar *before* Peters made the insubordinate statements. JA 33. Respondent fails to point to any facts permitting the conclusion that Grado was motivated to do so by any factor other than his undisputedly desperate need for coverage on Sunday. JA 31–32, 38–41. Grado then followed Edgar's instructions by ordering Peters to work on Sunday. Certainly, neither Grado nor Edgar could have predicted Peters's shocking response ("do what you have to do."). Grado then properly followed up to let Edgar know Peters's response, just as any competent unbiased supervisor would have done, and the matter was then taken out of his hands.

Nor is there evidence that Grado reported any false or slanted information to Edgar, or withheld any information from Edgar, which subsequently influenced her decision. As the District Court correctly concluded, the discrepancies between what Grado told Edgar and what Peters admits happened are immaterial. Grado merely told the truth about Peters's conduct, which was more than sufficiently egregious by Peters's own account to warrant termination under BCI policy, or even in the absence of such a policy.

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[5] It is also undisputed that Grado *did* report both Lopez and another Hispanic merchandiser, Damian Mirabel, to Human Resources for performance and attendance issues, and that Mirabel was terminated for unsatisfactory performance. JA 35, 48.

2. Respondent did not submit sufficient evidence that Edgar failed to make an independent decision; consequently, any causal chain arising from Grado's involving of Edgar is broken, and there is no proof of proximate causation. Although the Tenth Circuit stated that Edgar "relied exclusively" on information supplied by Grado, Pet. App. 2a, the District Court found that the undisputed facts showed that "Edgar did take some steps to more closely evaluate the situation," Pet. App. 63a, and even Respondent concedes that Edgar relied "*almost* entirely" on Grado's report. Resp. Br. 15 (emphasis added). The undisputed facts, moreover, show that Edgar's decision was based on more than just Grado's accurate report. Edgar also: (1) instructed Grado to obtain more facts, JA 18–19, 33; (2) reviewed Peters's personnel file wherein she found that Peter's had been placed on "Final Warning" for a previous insubordination incident, JA 46; (3) evaluated Peter's allegation of sickness, JA 22–23;[6] (4) evaluated his failure to appear on Sunday, *id.*; (5) evaluated his failure to call Grado about his sickness, JA 22–23; and (6) evaluated the bad precedent it would set for other employees if this employee could essentially dictate the times he would and would not work, *id.* In light of the

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[6] Respondent is incorrect to suggest that Edgar did not know about Peters's claim of sickness before she made the decision terminate because Grado "communicated to Peters at 5 p.m. that he should meet him the following morning." Resp. Br. 6. The support for this statement is Peters's deposition testimony, JA 217–19, which actually does not state that Grado told Peters about the meeting at 5 p.m. on Monday, October 1, 2001. Rather, Peters's testimony was that he "worked until 5:00" and spoke with Grado later "that evening." JA 218. The District Court correctly understood this undisputed evidence. Pet. App. 45a. There is simply no evidence to support the argument that Edgar was not aware of Peters's sickness claim before she made the decision to terminate.

undisputed fact that Edgar did not know—and could not have known—of Grado's alleged bias, this evaluation serves to break the chain of causation.

Finally, the Tenth Circuit and the Respondent criticize Edgar's failure to "get Peters's side of the story." Resp. Br. 35; Pet. App. 28a. Yet, both crucially ignore the meeting held on Tuesday, October 2, 2001 among Peters, Grado, Grado's manager (Don Bateluna), and HR member Sherry Pedersen. JA 219–220. In this meeting, Peters was confronted with his insubordinate conduct and permitted to respond. JA 220. Peters's response did not include a denial of his insubordinate conduct on Friday, September 28. JA 220–21; nor did his response include allegations that Grado had reported the insubordinate conduct because of his racial bias, *id.*; nor did his response include any complaints about Grado's alleged prior racially motivated conduct, *id.* Rather, Peters's response was that he "had reported off work because [he] wasn't feeling well." JA 221. Peters, therefore, had ample opportunity to raise his allegations of Grado's racial conduct before Grado's manager and an HR employee. Yet, just like all times before, he remained silent, and this silence negated any need for a heightened decisionmaking process by Edgar. Importantly, Peters's last conduct—remaining silent about discrimination in the workplace and threatening legal action—is antithetical to the objectives of Title VII. As a matter of law, BCI should not be held liable for its termination of Peters for his admitted insubordinate conduct.

CONCLUSION

For all of the foregoing reasons, the Tenth Circuit's decision should be reversed and the District Court's decision affirmed and reinstated.

Respectfully submitted,

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